

<b>Milo v RXR Constr. &amp; Dev. LLC</b>
2014 NY Slip Op 32907(U)
June 11, 2014
Supreme Court, Westchester County
Docket Number: 56264/2011
Judge: Orazio R. Bellantoni
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

**HON. ORAZIO R. BELLANTONI**  
**JUSTICE OF THE SUPREME COURT**

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THOMAS MILO AND KIMBERLY MILO,

Plaintiff(s),

- against -

RXR CONSTRUCTION & DEVELOPMENT LLC,  
AND RXR REALTY LLC,

Defendant(s),

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RXR CONSTRUCTION & DEVELOPMENT LLC,  
AND RXR REALTY LLC,

Third-Party Plaintiff(s),

- against -

ELITE ELECTRIC CONTRACTING, INC.,

Third-Party Defendant.

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Third-party defendant Elite Electric Contracting, Inc. (Elite Electric) moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor. Plaintiffs cross move for summary judgment in their favor.

The following papers were read:

Notice of Motion, Affirmation, and Exhibits (6)	1-8
Affirmation in Partial Opposition and Exhibit	9-10
Affirmation in Opposition	11
Affirmation in Reply and Exhibit	12-13

Notice of Cross-Motion and Affirmation	14-15
Affirmation in Reply and Opposition	16
Affirmation in Opposition and Exhibit	17-18
Affirmation in Reply	19

By way of background, plaintiffs commenced this action to recover for injuries allegedly sustained by plaintiff Thomas Milo while he was performing electrical work at defendants' premises. On January 11, 2011, plaintiff Thomas Milo was employed by Elite Electric and was standing on an A-frame ladder performing certain electrical work. After about an hour of performing this work, plaintiff Thomas Milo's arm came into contact with some wires that caused a shock, which caused him to shake along with the ladder and then he fell to the floor. Subsequently, plaintiffs commenced an action against defendants/third-party plaintiffs RXR Construction & Development LLC and RXR Realty LLC, who allegedly owned the premises at which plaintiff Thomas Milo's accident occurred. Thereafter, RXR commenced a third-party action against Elite Electric, alleging causes of action for breach of contract (first cause of action), contractual indemnification (second and third causes of action), common law indemnification (fourth cause of action), and declaratory relief (fifth cause of action), declaring that Elite Electric is obligated to defend and indemnify RXR. Elite Electric and plaintiffs now move for summary judgment.

Elite Electric contends that plaintiffs' claim under Labor Law § 240 (1) must be dismissed because the evidence establishes that the subject ladder was not defective and did not fail in any way. Elite Electric also contends that RXR's action for contribution or indemnification is barred because Elite Electric had workers' compensation insurance and there is no evidence that plaintiff Thomas Milo suffered a grave injury. Elite Electric further argues that RXR has no claim for contractual indemnification because Elite Electric's contract was with RexCorp. Construction and Development, LLC (RexCorp.) and not RXR. Lastly, Elite Electric contends that, given the foregoing, RXR's fifth cause of action is rendered moot.

Plaintiffs cross move for summary judgment on their claim under Labor Law § 240 (1). Plaintiffs contend that the mere fact that the subject ladder was able to shake and fall over is proof that the ladder failed to provide the proper protection. Moreover, plaintiffs point out that the ladder was not secured to prevent it from falling and that no safety equipment was provided to prevent injury. Based on the foregoing, plaintiffs request summary judgment on this claim.

In response to Elite Electric's motion, RXR withdraws the common law claims for contribution or indemnification (*i.e.*, the fourth cause of action) as there is no claim for a "grave injury." RXR then argues that there is sufficient evidence to establish that they are a continuation of RexCorp.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

The Second Department has explained that “[t]o prevail on a Labor Law § 240 (1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries” (*see Robinson v Bond St. Levy, LLC*, 115 AD3d 928, 928 [2d Dept 2014]). In the case of a fall from a ladder, a plaintiff must demonstrate that the subject ladder was “defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff’s injuries” (*id.* at 929). In meeting this burden, the fact that an accident occurred is not evidence of a Labor Law § 240 (1) violation or causation (*see Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 289 [2003]).

Here, the parties have failed to establish their *prima facie* entitlement to judgment as a matter of law on the claim under Labor Law § 240 (1). The parties’ submissions have raised triable issues of fact as to whether the subject ladder provided the proper protection within the meaning of Labor Law § 240 (1) and, if not, whether this was a proximate cause of plaintiff Thomas Milo’s fall. Accordingly, the parties’ motions for summary judgment on plaintiffs’ cause of action under Labor Law § 240 (1) are denied.

Next, the Court addresses the remainder of Elite Electric’s motion. Elite Electric has also failed to make out a *prima facie* showing of entitlement to judgment as a matter of law on third-party plaintiffs’ contract claims against it. Elite Electric asserts that the subject contract is between itself and RexCorp. Pointing out that RXR is not RexCorp., Elite Electric argues that RXR’s contractual indemnification claims must be dismissed. The subject contract, however, provides that “[t]o the extent permitted by law, Contractor shall indemnify, defend, save and hold harmless Owner, Ground Lessee, Architect and their respective partners, officers, directors, employees and anyone else acting for or on behalf of any of them (herein collectively called ‘Indemnitees’). . . .” Thus, Elite Electric agreed to indemnify other persons and entities other than RexCorp. As Elite Electric has failed to demonstrate that RXR cannot be considered “Indemnitees” under the contract, the remainder of Elite Electric’s motion for summary judgment is denied.

To the extent not specifically addressed herein, the Court finds the remaining arguments of the parties to be without merit. This matter is scheduled for a Settlement Conference on July 25, 2014, 2014 at 9:30 a.m. in Room 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther, King, Jr. Boulevard, White Plains, New York.

This order will be electronically filed.

Dated: June 11, 2014  
White Plains, New York

*Grazio R. Bellantoni*  
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Justice of the Supreme Court

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